No. 83-882

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

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GEORGE MISKOVSKY,
*Petitioner*,

v.

TULSA TRIBUNE COMPANY and
NEWSPAPER PRINTING CORPORATION,
*Respondents*.

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma**

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## BRIEF IN OPPOSITION OF RESPONDENTS TULSA TRIBUNE COMPANY AND NEWSPAPER PRINTING CORPORATION

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JAMES M. STURDIVANT
Counsel of Record
JOHN HENRY RULE
GABLE & GOTWALS
20th Floor Fourth National
Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
*Attorneys for Respondents*

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the judgment of the Oklahoma Supreme Court affirming the trial court's sustention of respondents' demurrers to petitioner's libel petition, and refusal to permit amendment of that petition, rests on "adequate and independent state grounds" and is therefore not reviewable under 28 U.S.C. § 1257(3).

2. If the judgment of the Oklahoma Supreme Court is reviewable under 28 U.S.C. § 1257(3), whether that judgment is correct under the facts alleged by petitioner and the First and Fourteenth Amendments to the United States Constitution.*

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* The caption of the case contains the names of all parties to the proceeding below. Pursuant to Rule 28.1, the Court is advised that respondent Tulsa Tribune Company is the privately-owned publisher of The Tulsa Tribune, and has no parent, subsidiaries (except wholly-owned subsidiaries) or affiliates. Tulsa Tribune Company and World Publishing Company, the respondent in No. 83-883, own all of the stock in respondent Newspaper Printing Corporation. Newspaper Printing Corporation has no parent, subsidiaries (except wholly-owned subsidiaries) or affiliates.

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Respondents Tulsa Tribune Company and Newspaper Printing Corporation respectfully submit that a writ of certiorari should not issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma entered on June 21, 1983.

### OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court has been officially reported at 53 Okla. Bar Journal 1751, and ap-

pears in the Petitioner's Appendix at 1a [hereinafter Pet. App.]. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Pet. App. 16a.

## CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. CONST. Amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. U.S. CONST. Amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

3. OKLA. STAT. tit. 12, § 1441, reprinted in Appendix A to this Brief.

4. OKLA. STAT. tit. 12, § 1443 (1971),[1] reprinted in Appendix B to this Brief.

## STATEMENT OF THE CASE

In one respect petitioner's Statement of the Case must be corrected. This action arises out of petitioner's unsuccessful campaign for election to the United States Senate from the State of Oklahoma in 1978. The genesis of the action was petitioner's repetition during the campaign, in a letter released to the press, of another candidate's charge that still a third candidate, then Governor and now Senator David Boren, was a homosexual, and request that Governor Boren answer, under oath, four questions, among which was, "Are you a homosexual or bisexual?" [2]

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[1] This statute was in effect at the time of the publications at issue. It was repealed by 1980 Okla. Sess. Laws ch. 68, § 1, effective April 10, 1980, but was reenacted as OKLA. STAT. tit. 12, § 1443.1.

[2] The letter appears in pp. 29a-31a of Appendix A to the Petition for Writ of Certiorari.

In his Statement of the Case, petitioner asserts categorically that, "The letter made clear that [petitioner] himself was making no allegations about Governor Boren." Petition for Writ of Certiorari ("Pet.") at 4. Petitioner's opinion as to the import of the letter is not irrefutably correct, as he implies. The letter does not state that petitioner "makes no allegations about Governor Boren himself."

## SUMMARY OF ARGUMENT

The decision below rests on adequate and independent state grounds; accordingly, this Court should deny the Petition for Writ of Certiorari. The Oklahoma Supreme Court determined that Miskovsky's libel Petition failed to state a cause of action under OKLA. STAT. tit. 12, § 1441. In so ruling, it relied on an Oklahoma case that predates this Court's decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Oklahoma Supreme Court's reference to language in *Gertz* indicating that a libel claim may not be based upon statements of opinion was unnecessary to the judgment below.

The decision below does not infringe on the petitioner's rights of free speech under the First and Fourteenth Amendments to the United States Constitution. To hold that petitioner has no cause of action for libel does not prevent him from speaking. The alleged chilling of his speech rights, if it has occurred, is not caused by the decision below, but by action of private parties. Accordingly, the alleged deprivation does not constitute state action, is not proscribed by the First and Fourteenth Amendments, and is not reviewable by this Court. Furthermore, the opinion below does not grant respondents "virtual absolute immunity" to speak about candidates for public office, the premise of petitioner's argument that his first amendment rights are somehow deprived by the decision.

Finally, respondents would note that the questions presented for review by petitioner were also presented for review by him in *Miskovsky v. Oklahoma Publishing Company*, 654 P.2d 587 (Okla.), *cert. denied*, —— U.S. ——, 103 S.Ct. 235 (1982).[3] This Court should deny the Petition in this case just as it did in the *Oklahoma Publishing Company* case.

## ARGUMENT

### I. The Decision Below Rests on an Adequate and Independent State Ground and Therefore Should Not Be Reviewed by This Court.

This Court has determined to deny review under 28 U.S.C. § 1257(3) if the decision by the state court below rests on adequate and independent state grounds. *E.g.*, *Michigan v. Long*, —— U.S. ——, 103 S.Ct. 3469 (1983). While the decision below refers to a privilege under the First Amendment to the United States Constitution against a libel claim based upon publication of a statement of opinion, the decision also rests clearly on the Oklahoma Supreme Court's determination that petitioner's First Amended Petition failed to state a cause of action for libel under OKLA. STAT. tit. 12, § 1441 and principles of Oklahoma law enunciated long before this Court's decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The alternative holding based on state law was sufficient to support the judgment and was not compelled by any interpretation of federal law. Under *Michigan v. Long*, *supra*, this Court should deny the Petition for Writ of Certiorari.

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[3] In the *Oklahoma Publishing Company* case, petitioner presented four questions for review, the first and fourth of which were identical to the questions presented by him in this case. *See* the summary of the Petition for Writ of Certiorari in No. 81-2407, 51 U.S.L.W. 3162 (1982).

The Oklahoma Supreme Court tested the First Amended Petition under long-standing principles of Oklahoma law —whether the publication complained of is libelous *per se*, and if not, whether the publication is libelous *per quod*, that is, susceptible of a defamatory meaning derivable from extrinsic facts and circumstances, which must be specifically pleaded and supported by proof of special damages. *E.g., M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) (construing Oklahoma law).

The Oklahoma Supreme Court first found that the publications at issue were not libelous *per se*, writing as follows:

> None of the publications charge the plaintiff with a commission of a crime or with anything that the plaintiff might not have legally and properly done. The factual data therein set forth as *facts* are true as is alleged in the allegations in plaintiff's petition. When viewed even in their most derogatory sense as related to the plaintiff, while possibly unflattering or even reprehensibly false *in their conclusions*, they are expressions of opinion, privileged under the First Amendment to the United States Constitution. Nor do the publications expose the plaintiff to public hatred, contempt, ridicule or obloquy, or tend to deprive him of public confidence, or injure him in his occupation within the meaning of 12 O.S. 1981, § 1441. *Thompson v. Newspaper Printing Corporation*, Okl., 325 P.2d 945 (1958).

Pet. App. at 9a (emphasis in original).

The Oklahoma Supreme Court then determined that the publications at issue were not libelous *per quod*, stating that the publications "are clear and unequivocal in their meaning and import and therefore immutable to innuendo." Pet. App. at 14a. Petitioner claimed that one cartoon showed him committing sodomy and that the cartoon falsely accused him of committing a crime; the Oklahoma Supreme Court rejected the claim, stating:

> An objective examination of the cartoon published August 11, 1978, neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does no more than express the writer's opinion of the political tactics of plaintiff's political campaign.

Pet. App. at 14a-15a.

The Oklahoma Supreme Court's decision, respondents submit, rests on two alternative grounds, the nonactionability of statements of opinion under the First Amendment, and the nonactionability of the publications at issue under the court's interpretation of OKLA. STAT. tit. 12, § 1441. In determining that the publications were not actionable under that statute, the court cited *Thompson v. Newspaper Printing Corp.*, 325 P.2d 945 (Okla. 1958), in which the Oklahoma Supreme Court sustained the trial court's dismissal of a libel petition for failure to state a cause of action based on a political advertisement which contained a cartoon showing the county assessor picking the pocket of a taxpayer. In *Thompson*, the Oklahoma Supreme Court held that the publication was privileged under OKLA. STAT. tit. 12, § 1443 (1951). That statute was recodified in 1971, was in effect at the time of the publications at issue, and is reprinted in Appendix B to this Brief.

In the decision below, the Oklahoma Supreme Court found that the publications at issue were not actionable under state law because of privileges established by state law, in addition to holding that the First Amendment prevented a libel claim based on the publications at issue. There was an adequate and independent state ground for the decision and, accordingly, petitioner's first question—whether the United States Constitution supplants state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth—need not be reviewed.

**II. The Decision Below Does Not Infringe on Petitioner's Free Speech Rights Under the First and Fourteenth Amendments; Any Alleged Deprivation Was Not Caused by State Action, and the Alleged Deprivation Is Therefore Not Reviewable by This Court.**

Petitioner's second question for review is whether the United States Constitution requires a balancing between the rights of media defendants and the rights of candidates for public office to freedom of speech and protection of reputation. The thrust of his argument is that the state, in denying him a cause of action for libel, chills his speech, the theory being, we presume, that out of fear that he will be unable to obtain redress for defamatory rebuttal, he will curb his speech during a political campaign.

The theory is too tenuous a reed on which to base a constitutional attack on the Oklahoma Supreme Court's decision, and if accepted would violate, rather than vindicate, rights of free speech under the First and Fourteenth Amendments. Furthermore, respondents submit that the chilling of which petitioner complains—assuming any exists—is not caused by his fear that he will be unable to recover damages for defamatory rebuttal, but of the rebuttal itself; since that alleged chilling is caused by private rather than state action, there is no constitutional issue for this Court to review under petitioner's second question. Finally, the premise of petitioner's chilling argument—that the decision below grants the press "virtual absolute immunity"—is faulty. The decision does no such thing; it merely holds that petitioner had not stated a cause of action based on a discrete set of facts, and indeed recognizes the elements of a political candidate's cause of action for libel.

To prevail on his chilling theory, petitioner must first convince this Court that press publications containing true facts and statements of opinion based thereon, about a candidate for public office, may give rise to a libel cause

of action, for in order to prevent the chilling of his speech rights which he alleges, petitioner must be granted the right to proceed and recover against respondents on his libel claim. The essence of his claim is that respondents falsely accused him of calling Governor Boren a homosexual, even though he admits releasing to the press a letter to Governor Boren in which he repeated that charge made by another. Even if it is assumed that respondents did charge petitioner with having called Governor Boren a homosexual, can it reasonably be said that such a charge is knowingly or recklessly false under the admitted facts? Respondents submit that the answer is "no" and that a contrary answer would violate this Court's repeated pronouncements that speech in the course of a political campaign is especially deserving of constitutional protection. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1971).[4]

Petitioner's second question fails to merit review because it is unclear that the alleged chilling of his speech rights is caused by any state action at all. Unless the alleged infringement of his constitutional rights was occasioned by the state, there is no ground for review by this Court; the Fourteenth Amendment protects citizens from deprivations of constitutional rights by the state, not from deprivations of other citizens. *E.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Respondents submit that the alleged chilling of petitioner's speech rights—assuming it exists—is caused not by his fear of

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[4] Petitioner also argued that the cartoon reprinted at Pet. App. 46a falsely accused him of committing the crime of sodomy. The Oklahoma Supreme Court rejected this argument, holding that even if the cartoon were construed in its most derogatory sense, it was a nonactionable opinion of petitioner's political tactics. Pet. App. at 14a-15a. That decision not only follows Thompson v. Newspaper Printing Corp., 325 P.2d 945 (Okla. 1958), but is also consistent with this Court's decision in Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

an inability to recover damages for defamatory rebuttal, but by the rebuttal itself, which issues from a private person. The state, even if it protects the rebuttal from a libel claim, cannot be said to be responsible for such speech in the sense that it has authorized or compelled it. The alleged deprivation of which petitioner complains, therefore, is not caused by the state, is not proscribed by the First and Fourteenth Amendments, and is not reviewable by this Court. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991 (1982), in which this Court noted the rule that private action does not amount to state action for purposes of the Fourteenth Amendment, and that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004 (citations omitted). Even if respondents relied on the protection in state law for their "chilling rebuttal," the state's protection of such speech does not transform essentially private actions into state actions for purposes of the Fourteenth Amendment. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 943 (1982) (Burger, C.J., dissenting). The initiative for the "chilling rebuttal" rests with the private individual. In short, the deprivation of his constitutional rights which petitioner raises in his second question for review was not caused by the state, does not present a constitutional issue, and is not reviewable by this Court.[5]

Finally, the premise of Petitioner's chilling argument is that the decision below grants the press "virtual absolute immunity" and that because such broad immunity exists, there political candidates fear to speak. The prem-

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[5] In his second question, petitioner indicates that his "right to protect his reputation" is also protected by the Fourteenth Amendment. It is clear that petitioner's reputational interest is not the type of "property" protected from deprivation by the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693 (1976).

ise is faulty. All the decision below holds is that on a discrete set of facts, petitioner has no libel claim. In fact, the decision specifically recognizes that political candidates may maintain libel claims in appropriate circumstances, and sets forth the elements of such a libel claim. Pet. App. at 7a-8a. Since redress for defamation is available to political candidates, petitioner's chilling argument must fail.

## CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision below rests on an adequate and independent state ground, and petitioner's other issues do not merit review.

Respectfully submitted,

JAMES M. STURDIVANT
Counsel of Record
JOHN HENRY RULE
GABLE & GOTWALS
20th Floor Fourth National
Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
*Attorneys for Respondents*

## APPENDIX A

OKLA. STAT. tit. 12, § 1441 provides:

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tend to scandalize his surviving relatives or friends.

## APPENDIX B

OKLA. STAT. tit. 12, § 1443 (1971) (in effect at the time of the publications in issue) provided in pertinent part:

> A privileged publication or communication is one made:
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> . . . . Third. By a fair and true report of any legislative or judicial or other proceedings authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
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> . . . No publication which, under this section, would be privileged, shall be punishable as libel.

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